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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 1267

MACIO BERNARD SIMPSON,

Petitioner,

-VS-

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

That portion of the petition pertaining to the jurisdictional and constitutional provisions involved is acceptable to the Respondent.

QUESTION PRESENTED

Did the Petitioner properly establish the existance of an estoppel requiring the application of the rule enunciated by this Court in Ashe v. Swenson, 397 U.S. 436, 1970.

STATEMENT OF THE CASE

The Statement of the Case as appears on page three of the petition filed herein is wholly unacceptable to the Respondent. Hence, the Respondent feels obligated to set forth its version of the facts of the case.

Petitioner, together with Raymond Rico Rivers and Jonathan Griffin, was tried and convicted of robbing one Patricia Daniels at the Kozy Korner, a convenience store in Jacksonville, Florida, on November 9, 1966. Petitioner and Griffin appealed said conviction to the District Court of Appeal, First District, claiming the Court erred in failing to grant an instruction on the lesser included offense of larceny. The District Court of Appeal, First District, reversed the convictions of Petitioner and Griffin and remanded the cause for a new trial. Griffin v. State, Fla.App. 1st 1967, 202 So.2d 602.

In July, 1968, the Petitioner was again tried on the charge of robbing Patricia Daniels, the manager of the Kozy Korner, and was apparently acquitted on that charge.

On May 28, 1969, Macio Simpson, the Petitioner, and Raymond Rico Rivers, the nonappealing defendant convicted in the original prosecution, were tried on the charge of robbing Willie D. Moore, a customer who was in the Kozy Korner the night Patricia Daniels was robbed.

Pat Daniels, the manager of Kozy Korner Sundries, located in Jacksonville, Florida, testified that on the evening of November 9, 1966, two men, one armed with a sawed-off shotgun and the other with a small pistol robbed the Kozy Korner. She testified that one man was tall and the other short and that the latter was wearing a dark colored bandana across his face and a hat. The witness testified that the Petitioner and his co-defendant, Raymond Rivers, were the two men that committed the robbery. This witness was positive as to the identity of Rivers, but the best identification she could make as to Petitioner was that he was "quite similar to him, very similar to him", although she saw him at a lineup within an hour after the crime and at that time there was no question in her mind that Petitioner and Rivers were the ones that committed the robberies. This witness also testified that after they took the money from the register the short man (Petitioner) took the wallet belonging to Willie D. Moore. The two men then directed everyone to lie on the floor and when they complied, Petitioner and Rivers fled from the store.

Mr. Moore testified that on November 9, 1969, he was in the Kozy Korner making a telephone call when two individuals robbed the store owner and took his wallet containing $20.00. Mr. Moore stated the short one, while holding the pistol on him, took his wallet, removed the money and threw the wallet on the floor. Mr. Moore's description of

Petitioner and Rivers coincided with Mrs. Daniels; however, he testified there was no doubt in his mind as to the identity of the robbers. Mr. Moore testified he followed the Petitioner out of the store down 9th Street and saw them turn the corner. He began to go back for his truck so that he could chase Petitioner when he saw a police car which he jumped into. He directed the police which way Petitioner and Rivers had gone. They found the men in the immediate area, at which time Mr. Moore saw Petitioner throw the bandana underneath the car. On cross-examination Mr. Moore testified Rivers did nothing or said nothing to him with respect to his wallet or money.

Archie Roper, a workman for Mr. Moore testified that he saw the defendants standing out in front of the Kozy Korner as he was walking to his truck and was able to clearly see Petitioner's face as the bandana or handkerchief was hanging to the side. Mr. Roper testified when he returned to the store from his truck and was about to go in he saw the hold-up taking place inside. Mr. Roper unequivocally identified the Petitioner as the man who held up the victim, Mr. Moore. As the witness left to go call the police, he noticed a patrol car approaching. He also went to the area where Petitioner and Rivers were taken into custody and testified there was no doubt in his mind that the men police arrested were the same men he saw at the store.

Patrolman J. T. Gay, one of the arresting officers, testified that he arrested Petitioner, Rivers and a third person on Wilcox Street near Eighth Street. Officer Gay, who retrieved the hat and bandana previously identified by the witnesses, Daniels, Moore and Roper, testified he saw the Petitioner place the hat and scarf under the automobile he was at when arrested. In the hat, Officer Gay found an undetermined amount of cash.

The Petitioner testified in his own behalf and said he had just gotten out of a taxi cab and was walking down the street when he saw several men running. He further related that the next thing he knew an officer was ordering him to halt as he was under arrest. He, of course, denied knowing Rivers and denied that he had robbed Willie Moore.

Raymond Rivers testified that on the night in question he "was at Ninth and Myrtel where [he] robbed the business establishment, which [he] was tried and convicted for. . .once before. . .."; however, he denied having robbed Moore the only crime which Petitioner and Rivers were then being tried for. Rivers testified that Petitioner was not with him at the time of the robbery but he was arrested later that night. Rivers testified a man by the name of Dennie Wilson was with him and was wearing a "goldish" colored handkerchief. Wilson, who was described as "six feet tall" was allegedly released by the police.

On rebuttal, Miss Daniels testified that Petitioner was only about five feet seven inches tall and apparently refuted the color of the bandana worn by the robber as testified to by Rivers. Archie Roper did also. Officer Gay testified the man he released was well dressed and was about five-seven or five-eight and not six feet tall.

The cause was submitted to the jury and they returned a verdict of guilty as charged against the Petitioner but found Rivers not guilty of robbing Willie Moore.

The Petitioner again instituted an appeal to the District Court of Appeal, First District, asserting as grounds for reversal: (1) that the Court erred in giving an instruction to the jury and (2) that the evidence was insufficient to support the conviction. Petitioner made no claim that he was subjected to double jeopardy. Indeed, such was never even assigned as error. See Respondent's Exhibit "A", App. p. 15.

After the District Court affirmed the judgment and sentence, Petitioner filed his petition for rehearing asserting, among other things, that he had been subjected to double jeopardy as defined by this Court in the Ashe case. The Respondent, pursuant to said petition, filed a response wherein it contended that the Petitioner had failed to demonstrate the existance of an estoppel by including in the record on appeal the transcript of the proceedings had in

July, 1968. See Respondent's Exhibit "B", App. p. 17. The Respondent, after noting the manner in which a Court must determine whether an estoppel does or does not, in fact, exist as enunciated by this Court in the Ashe decision, 397 U.S. at 444 and noting the Court did not have the trial transcript stated:

> "It is impossible for it [the Court] to ascertain whether the jury in the 1968 trial could have based its verdict on a basis other than that of petitioner-appellant's identity. Indeed, inasmuch as counsel for the petitioner at the trial raised this defense (TT 154), but did not include the transcript of the prior trial, it must presume that the prior acquittal did not forclose the point. This would also explain why counsel for the petitioner-appellant did not see fit to raise the matter on direct appeal."

Respondent concluded that the Petitioner had failed to demonstrate the existence of estoppel and that the Petition for Rehearing should be denied.

In due course, the District Court of Appeal rendered the decision sought to be reviewed wherein said Court denied Petitioner's Petition for Rehearing. Simpson v. State, Fla.App. 1st 1970, 237 So.2d 341. The Court, after review-

ing the background of the cause concluded: "...so it is then that we have a question of double collateral estoppel in that by application of this doctrine, appellant is estopped from contending without further proof that the State failed to prove the issue of his identity as one of the robbers on the occasion of the second trial inasmuch as on the first trial a jury had found above and beyond a reasonable doubt that appellant was a participant in the robbery..." 237 So.2d at 342. (Emphasis supplied)

REASONS WHY THE WRIT SHOULD NOT ISSUE

Viewing the record as developed by the Petitioner, it seems rather apparent that his statement that "The only issue was the identity of the robber..." in all three trials is something which neither the Respondent nor the District Court of Appeal, First District, were able to ascertain in fact. Moreover, one must wonder at counsel's statement that he raised by assignment of error the complaint he now brings to this Court. As a matter of fact, it was not raised in the appellant's brief nor presented on oral argument, for indeed, in this case there was no oral argument. Of course, such may be regarded as trivia when we substitute allegations in lieu of fact properly presented and developed.

The Respondent suggests to this Court that Petitioner has still failed to demonstrate an Ashe estoppel and if this Court were to bring before it the complete record on appeal, it itself could not make the critical analysis required to determine if, in fact, such exists. In light of the deficiencies in this record, the Respondent suggests that whatever else may be said of the District Court's opinion, they were right in concluding that appellant was estopped "without further proof" from claiming an estoppel.

What must one presume from counsel's failure to produce the transcript of the prior trial other than that he cannot demonstrate that an examination of the prior record, including the pleadings, evidence and charge will reveal the verdict of the 1968 trial forclosed the verdict in the subsequent trial. Why does counsel go to such length to augur for a polity of one trial per criminal transaction --- a principle repudiated by this very Court in Ashe itself --- unless it is because he cannot support an estoppel upon an inspection of the record. Counsel suggests this is a fairer and easier method and that it does not require the accused "to run the gantlet." One might well ask whether Petitioner found it distasteful to run a gantlet a second time which resulted in the acquittal or was it only the third trip which he found offensive? If counsel was geniunely interested in but a single trial, the Respondent wonders why Petitioner did not file the appro-

priate motion to consolidate the informations for trial, which is his for the asking, under Rule 1.190(k), Florida Rules of Criminal Procedure. Could it have been that he did not wish to have all the charges tried simultaneiously? Surely it must appear to this Court that your Petitioner is asking for "the best of both worlds." Respondent is of the view that when counsel failed to move for a consolidation of the charges, he waived any right to claim an acquittal in the prior case constituted an estoppel in the subsequent case. U. S. v. Hoyland, 7th Cir. 1959, 264 F.2d 346. This is not to suggest --- as Petitioner would make this Court think --- that he may not maintain in the subsequent prosecution that he was not present when the crime was committed. Indeed, he was permitted to do so. What it simply means is that the prior finding of fact cannot be impleaded as a bar against a contrary finding of fact. If there be a suggestion that at the time the cause came on for trial, counsel could not anticipate this Court's newly announced rule with respect to State trials, and thus, could not intelligently waive this right, Respondent points out that long prior to the prosecution of this case, the District Court of Appeal, First District, recognized the principle of res judicata and/or collateral estoppel as being applicable in criminal proceedings. Busbee v. State, Fla.App. 1966, 183 So.2d 27.

In conclusion, Respondent's position is that the Petitioner has utterly

failed to demonstrate not only to the District Court of Appeal, First District, but to this Court as well, that an estoppel, in fact, existed forclosing the prosecution. Had he done so and the District Court blindly ignored that which he would be entitled to under this Court's pronouncement in Ashe, then a substantial federal question would truly exist. Inasmuch as he has not done so and cannot in the record presented to the District Court of Appeal, Respondent maintains he has not shown the existence of such a question. Accordingly, the Respondent urges the Court to decline to exercise its jurisdiction to review this matter further.

CONCLUSION

Petition for writ of certiorari should be denied.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General

RAYMOND L. MARKY
Assistant Attorney General

Counsel for Respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Response to Petition for Writ of Certiorari has been forwarded to Honorable Louis O. Frost, Jr., Public Defender, Duval County Courthouse, Jacksonville, Florida 32202, via U. S. Mail, this ___ day of April, 1971.

RAYMOND L. MARKY
Assistant Attorney General
The Capitol
Tallahassee, Florida 32304

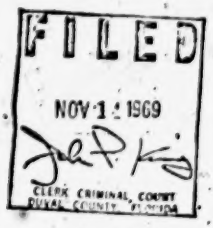
Counsel for Respondent

APPENDIX

APPENDIX A

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO. 68-3389 DIVISION C



STATE OF FLORIDA,

vs.

MACIO BERNARD SIMPSON

ASSIGNMENTS OF ERROR

Comes now the defendant, Macio Bernard Simpson, by and through his undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, and assigns the following errors upon which he intends to rely in the District Court of Appeal, First District, as grounds for appealing the verdict returned May 29, 1969, and the judgment and sentence imposed August 26, 1969, in the above styled cause, to-wit:

1. The Court erred in denying the defendant's motion for directed verdict at the close of the State's case.

2. The Court erred in denying the defendant's motion for directed verdict at the close of all the evidence.

3. The Court erred in denying the defendant's Motion for New Trial.

4. The trial Court erred in overruling the appellant's objection to a leading question, to-wit: "But now it is not processed, is that it?"

5. The trial Court erred by giving the "dynamite charge" when it was not requested by either party, objected to by the defendant and when the jury had only been out for one and one-half hours.

LOUIS O. FROST, JR.
PUBLIC DEFENDER

By Barry S. Scott
Assistant Public Defender

I HEREBY CERTIFY that a copy of the foregoing Assignments of Error has been furnished to Honorable T. Edward Austin, State Attorney for the Fourth Judicial Circuit of Florida, by hand, and Honorable Earl Faircloth, Attorney General for the State of Florida, by mail, this 14th day of November, 1969.

Barry S. Swift

Gerald Sohn
Assistant Public Defender

APPENDIX B

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

MACIO BERNARD SIMPSON,
Appellant,
-v- CASE NUMBER M-259
STATE OF FLORIDA,
Appellee.

RESPONSE TO PETITION FOR REHEARING

Comes now the appellee, the State of Florida, by and through its undersigned counsel, pursuant to this Court's order of July 17, 1970, and files this its response to the petition for rehearing filed by the appellant, Macio Bernard Simpson, in the above-styled cause.

As the record on appeal now exists, the petitioner has not established his entitlement to reversal of judgment and sentence.

Although this Court does have before it the testimony of proceedings taken in the Criminal Court of Record in and for Duval County, Florida, of February 16, 1967, in the case of State of Florida versus Raymond Rico Rivers, Macio Bernard Simpson, and Jonathan Griffin, case number J-85, wherein said appellant was found guilty of robbery of the Kozy Korner, it does not have before it the testimony taken on or about July 9, 1968, wherein appellant was allegedly acquitted of having robbed said Kozy Korner. Petitioner-appellant's original conviction was reversed by this Court on September 26, 1967, on the sole ground that the trial court failed to instruct the jury regarding the lesser included offense of larceny. Griffin v. State, (Fla.App.1st 1967),

202 So.2d 602. In the case of Ash v. Swenson, ___ U.S. ___, 25 L.Ed.2d 469, decided April 6, 1970, relied upon by petitioner herein, it was stated:

> "Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' 25 L.Ed.2d at page 475, 76.

This Court not having before it the transcript of the proceedings had in July, 1968, it is impossible for it to ascertain whether the jury in the 1968 trial could have based its verdict on a basis other than that of petitioner-appellant's identity. Indeed, inasmuch as counsel for the petitioner at the trial raised this defense (TT 454), but did not include the transcript of the prior trial, it must presume that the prior acquittal did not forclose the point. This would also explain why counsel for the petitioner-appellant did not see fit to raise the matter on direct appeal.

In any event, the petitioner-appellant has failed to demonstrate the existence of an estoppel by the prior criminal proceedings as required under Ash v. Swenson. Accordingly, the petition for rehearing should be denied.

Respectfully submitted,

EARL FAIRCLOTH
Attorney General

RAYMOND L. MARKY
Assistant Attorney General
The Capitol
Tallahassee, Florida 32304

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Response to Petition for Rehearing has been forwarded to Honorable Gerald Sohn, Assistant Public Defender, Fourth Judicial Circuit, Duval County Courthouse, Jacksonville, Florida, by mail, this ___ day of July, 1970.

RAYMOND L. MARKY
Assistant Attorney General
The Capitol
Tallahassee, Florida 32304

OF COUNSEL FOR APPELLEE